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NOTES

Discovery of Retained Nontestifying Experts' Identities Under the Federal Rules of Civil Procedure

A number of strategic considerations may induce a party to a lawsuit to retain an expert who will not be called as a trial witness to assist in the party's preparation for trial.¹ Because facts known and opinions held by these nontestifying experts may greatly facilitate trial preparation,² the retaining party's opponent may attempt to discover this information. Federal Rule of Civil Procedure 26(b)(4)(B), however, allows discovery of "facts known or opinions held" by retained but nontestifying experts only after "a showing of exceptional circumstances."³

Whether rule 26(b)(4)(B) also limits discovery of the identity of such witnesses is an open question, the resolution of which must accommodate two competing policies. On the one hand, ignorance of the identity of nontestifying experts may hamper a party's ability to demonstrate that "exceptional circumstances" justify discovery of the "facts known or opinions held" by those experts. On the other hand, knowledge of an expert's identity may enable a party to circumvent rule 26(b)(4)(B)'s limitations by seeking information directly from the expert rather than from the opposing party. The courts that have considered motions to compel discovery of the identities of nontestifying experts have struck different balances between these policies and have been unable to agree on a single standard against which to test requests for identification. Some courts have held that rule 26(b)(4)(B)'s "exceptional circumstances" test applies not only to information possessed by nontestifying experts, but also to their identities.⁴ The majority view, however, is that parties seek-

1. Cf. Note, *A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained*, 12 U. MICH. J.L. REF. 533, 546-47 (1979) (suggesting that "free agent" experts — those who had been retained by a party to a multi-party suit who has left the litigation — may be retained by another party "to educate the party in a general fashion concerning the merits of his case, . . . to obtain information that can be used at trial against the opposing party [, and] . . . to obtain and conceal information that an opposing party could use at trial").

2. See Note, *Civil Procedure — Discovery of Expert Information*, 47 N.C. L. REV. 401, 406 (1969).

3. FED. R. CIV. P. 26(b)(4)(B).

4. See *Ager v. Jane C. Stormont Hosp. & Training School for Nurses*, 622 F.2d 496 (10th Cir. 1980); *Perry v. W.S. Darley & Co.*, 54 F.R.D. 278 (E.D. Wis. 1971). In *Guilloz v. Fal-mouth Hosp. Assn.*, 21 Fed. R. Serv. 2d 1367 (D. Mass. 1976), the court said that it preferred the *Perry* rule, but refused to allow discovery of a nontestifying expert's name on the ground that, in any event, it did not meet the relevance requirement of rule 26(b)(1). 21 Fed. R. Serv. 2d at 1371.

ing discovery of the identities of their adversaries' retained nontestifying experts need not demonstrate "exceptional circumstances."⁵ Courts adopting this view have concluded that rule 26(b)(4)(B) does not render rule 26(b)(1)'s relevance standard inapplicable to simple requests for identification.

The procedural and substantive differences between the two approaches are significant.⁶ If a party must satisfy only rule 26(b)(1), discovery will proceed routinely. An interrogatory requesting identification demands an answer or objection. If the party served with an interrogatory refuses to answer, the discovering party may seek an order compelling discovery.⁷ But if discovery of a nontestifying expert's identity is conditioned on a showing of "exceptional circumstances," the discovering party must always seek a court order, and the norm of extrajudicial discovery⁸ is reversed. More important than this procedural difference between the majority and minority views is the divergence of the applicable standards. Rule 26(b)(1)'s relevance standard is broad, while rule 26(b)(4)(B)'s "exceptional circumstances" test is narrow. Under the former standard, the identity of nontestifying experts will almost always be discoverable; under the latter standard, discovery will occur only rarely.

This Note proposes an approach to the problem of identification of rule 26(b)(4)(B) experts that differs from both of the approaches taken in the reported opinions.⁹ Part I analyzes the language of rule 26(b) and rejects the majority approach. As a matter of statutory

5. See *Martin v. Easton Publishing Co.*, 85 F.R.D. 312 (E.D. Pa. 1980); *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 256 (N.D. Ill. 1979); *Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416 (E.D. Pa. 1978); *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624 (S.D. Fla. 1977); *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179 (D. Md. 1976); *Sea Colony, Inc. v. Continental Ins. Co.*, 63 F.R.D. 113 (D. Del. 1974).

6. The difference of opinion has been noted by a number of commentators. See 4 MOORE'S FEDERAL PRACTICE ¶ 26.66[4] (2d ed. Supp. 1980-81) (endorsing majority view); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2032, at 255 & n.81 (1970 & Supp. 1980) (apparently endorsing majority view); Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 933-34 [hereinafter cited as Graham I] (stating that issue may be of little consequence since a retained expert will refuse to speak voluntarily with an opponent). In a later article, however, Professor Graham argues in favor of the minority view. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, an Empirical Study and a Proposal*, 1977 U. ILL. L.F. 169, 201-02 [hereinafter cited as Graham II].

7. See FED. R. CIV. P. 37(a).

8. See 4 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 26.02[5], at 26-72 ("discovery Rules [are] . . . intended to operate on the initiative of the parties and, where possible, without court intervention").

9. The paucity of reported cases does not reflect the importance of the issue or frequency with which it arises. For example, one study reported that while from July 1960 to April 1964, there were only 348 cases involving discovery reported in the Federal Rules Decisions and the Federal Rules Service, it was estimated that the district courts in 1962 alone made over 8,000 discovery decisions. See Note, *Federal Discovery Rules: Effects of the 1970 Amendments*, 8 COLUM. J. L. & SOC. PROB. 623 n.3 (1972) (citing COLUMBIA UNIVERSITY PROJECT FOR EFFECTIVE JUSTICE, FIELD SURVEY OF FEDERAL PRE-TRIAL DISCOVERY, lv-1 to -2). In addition

construction, rule 26(b)(4)(B) governs the disclosure of the identity of nontestifying experts retained by a party in preparation for trial. Part II examines the underlying purposes of rules 26(b)(1) and 26(b)(4)(B) — to ensure adequate pretrial disclosure and to prevent unfairness in adversarial competition — and suggests that both interests may be accommodated. These interests are appropriately balanced by requiring a party to show “exceptional circumstances” to discover the name and address of a rule 26(b)(4)(B) expert, but allowing routine discovery by interrogatory of such an expert’s specialty or field of expertise and a brief description of the services that the expert performed in anticipation of litigation.

I

The standard governing the discoverability of the identity of nontestifying experts retained by a party in anticipation of litigation will be found in either rule 26(b)(1) or rule 26(b)(4)(B). Rule 26(b)(1), the general scope-of-discovery provision, allows discovery of “any matter . . . relevant to the subject matter involved in the pending action, . . . including . . . the identity and location of persons having knowledge of any discoverable matter.”¹⁰ Other provisions of rule 26(b), however, limit the discoverability of certain types of information.¹¹ Although relevant, “facts known and opinions held by experts . . . acquired or developed in anticipation of litigation or for trial” may be discovered only if the moving party satisfies the requirements of rule 26(b)(4).¹² Under rule 26(b)(4)(B), “facts known or opinions held” by specially retained experts who are not expected to testify at trial are discoverable “only . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.”¹³

to the infrequency of reported opinions, many discovery disputes are never even brought to the attention of courts but rather are informally resolved by the parties themselves.

Appellate review of discovery rulings is rare because they are not usually final orders and thus are not immediately appealable. While a discovery ruling can be reviewed on appeal from a later final order, by then the matter is usually moot. Occasionally, there is review from a sanction imposed under rule 37 — the procedure employed in the only reported court of appeals decision to date on the topic of this Note, *Ager v. Jane C. Stormont Hosp. & Training School for Nurses*, 622 F.2d 496, 499 (10th Cir. 1980). For a discussion of appellate review of discovery orders, see C. WRIGHT & A. MILLER, *supra* note 6, § 2006.

10. FED. R. CIV. P. 26(b)(1). Courts consider that the relevance requirement is met whenever there is any possibility that the information sought may be relevant to the subject matter of the action. See C. WRIGHT & A. MILLER, *supra* note 6, § 2009, at 46-47, and cases cited therein.

11. See FED. R. CIV. P. 26(b)(3) (limiting discoverability of attorney’s work product); FED. R. CIV. P. 26(b)(4)(A) (specifying scope of discovery from experts who are expected to testify at trial).

12. FED. R. CIV. P. 26(b)(4).

13. FED. R. CIV. P. 26(b)(4)(B) (emphasis added). Rule 26(b)(4) creates a complex scheme

The language of rules 26(b)(1) and 26(b)(4)(B) has given rise to two conflicting inferences. Reasoning that rule 26(b)(4)(B) only limits the discoverability of "facts known or opinions held" by nontestifying experts and not their identities, most courts find that rule 26(b)(1) governs and order disclosure of experts' identities on a simple showing of relevance.¹⁴ In *Ager v. Jane C. Stormont Hospital and Training School for Nurses*,¹⁵ however, the Tenth Circuit rejected this approach and applied rule 26(b)(4)(B)'s "exceptional circumstances" standard to a request for disclosure of the names and locations of nontestifying experts. The *Ager* court relied on the Advisory Committee Note to rule 26(b)(4)(B), which states that "[a]s an ancillary procedure, a party may on a proper showing require the other party to name experts retained or specially employed, but not those informally consulted."¹⁶ For policy reasons, the court held that a "proper showing" corresponds to a showing of "exceptional circum-

regarding expert discovery. The rule contains three subdivisions: subdivision A, addressing experts expected to testify as expert witnesses at trial, subdivision B, addressing retained nontestifying experts, and subdivision C, concerning payment of fees. Under rule 26(b)(4)(A), a party may through interrogatories require his adversary to identify each expert that the adversary expects to call at trial and to describe the substance of and the grounds for the expert's expected testimony. Further discovery by other means, such as deposition of the expert or production of documents prepared by the expert, may be had only on motion and court order. Under rule 26(b)(4)(C), if the court does order further discovery, it *shall* require the discovering party to pay the expert a reasonable fee for time spent in responding to discovery, and *may* require the discovering party to pay the retaining party a fair portion of the fee incurred by the latter in hiring the expert.

In contrast to rule 26(b)(4)(A), which allows limited discovery as of right regarding testifying experts, rule 26(b)(4)(B) protects the information possessed by retained nontestifying experts in the absence of a special showing.

Rule 26(b)(4) directly addresses only testifying and retained nontestifying experts, but it also covers two additional categories of experts. The first is experts whom a party has informally consulted in preparation for trial but has not retained or specially employed. Courts agree that neither the identities of these persons nor their information is subject to discovery. *See, e.g., Nemetz v. Aye*, 63 F.R.D. 66, 68 (W.D. Pa. 1974); Advisory Committee Note, 48 F.R.D. 487, 504 (1969). The second category consists of experts whose information was not acquired in preparation for trial. These experts are outside the scope of rule 26(b)(4) since the introductory language of the rule limits its coverage to expert information "acquired or developed in anticipation of litigation or for trial." FED. R. CIV. P. 26(b)(4). As a result, routine discovery may be had regarding information possessed by an expert that was not acquired in preparation for trial. *See C. WRIGHT & A. MILLER, supra* note 6, § 2033. Examples of experts who are outside the scope of rule 26(b)(4) are (1) the expert who is regularly employed by a party and not specially employed on the case, 48 F.R.D. at 504, and (2) the expert who has information acquired as an actor or viewer with respect to the transactions that form the basis of the lawsuit, 48 F.R.D. at 503.

14. *See, e.g., Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179 (D. Md. 1976):

This provision of Rule 26(b)(1) is not by its terms limited to the identity and location of non-experts but, on the contrary, expressly allows such information to be obtained as to any "persons having knowledge" of discoverable matter. Such a broad umbrella encompasses the category of [retained nontestifying experts] . . . since they may have knowledge of matter discoverable or potentially discoverable under the provisions . . . of Rule 26(b)(4)(B).

71 F.R.D. at 181-82.

15. 622 F.2d 496 (10th Cir. 1980).

16. Advisory Committee Note, 48 F.R.D. 487, 504 (1969) (emphasis added).

stances" under rule 26(b)(4)(B).¹⁷

The majority approach finds considerable support in rule 26(b). Rule 26(b)(1) permits discovery of the identity of persons possessing discoverable information, and rule 26(b)(4) does not, on its face, remove the *identities* of nontestifying experts from the scope of the general discovery provision. In contrast to rule 26(b)(4)(A), which requires a "party . . . to identify each person whom the . . . party expects to call as an expert witness at trial upon request by interrogatory,"¹⁸ rule 26(b)(4)(B) makes no reference to an expert's identity. This omission may mean that the drafters of rule 26(b)(4) intended to apply rule 26(b)(1)'s relevance standard to requests for identification of nontestifying experts retained by a party in anticipation of litigation.

Closer examination, however, reveals several defects in this analysis. First, the omission of any reference to identity in rule 26(b)(4)(B) may actually support the minority position. Rule 26(b)(4) establishes a general rule barring discovery of "facts known and opinions held by experts," and then carves out limited exceptions for testifying and nontestifying experts. That the drafters thought it necessary to except the identities of testifying experts from rule 26(b)(4)'s general prohibition may suggest that the rule's scope is broader than a casual reading would suggest. By expressly mandating the disclosure of the identities of testifying experts only, the drafters, by implication at least, have hinted that the identity of nontestifying experts need not be revealed. Under the majority approach, the identities of both testifying and nontestifying experts are routinely discoverable, and the distinction in treatment suggested by the different language of rules 26(b)(4)(A) and 26(b)(4)(B) is eliminated.

Second, when read in conjunction with rule 26(b)(1), rule 26(b)(4)(B)'s restrictions on discovery of information from nontestifying experts extend to the identities of such experts as well. Rule 26(b)(1) requires only that a party identify "persons having knowledge of any *discoverable* matter."¹⁹ Rule 26(b)(4)(B) permits discovery of "facts known or opinions held" by nontestifying experts only under "exceptional circumstances," in effect removing these experts, in all but rare cases,²⁰ from the class of persons possessing discoverable

17. 622 F.2d at 503.

18. FED. R. CIV. P. 26(b)(4)(A)(i).

19. FED. R. CIV. P. 26(b)(1) (emphasis added).

20. As one treatise states: "[The exceptional-circumstances] formulation contemplates that in most cases discovery will not be permitted of information held by specially retained experts who are not to be called at trial." C. WRIGHT & A. MILLER, *supra* note 6, § 2032, at 256 (footnote omitted). An example of exceptional circumstances is where an expert has examined or runs tests on an item that is now altered or destroyed. See cases cited in C. WRIGHT & A. MILLER, *supra* note 6, § 2032, at 256 n.87. In such a case, it is not merely "impracticable," the

ble information. Rule 26(b)(1)'s command, therefore, does not apply to retained but nontestifying experts. That rule 26(b)(1)'s identification requirement is intended to apply to eyewitnesses to the occurrences giving rise to a lawsuit rather than to specially retained experts is further evinced by an examination of the purposes of the disclosure requirement. As Professors Wright and Miller explain, "The thought is that when a party has . . . [discovered] who the witnesses are and where they may be found, that he can then interview the witnesses, take their depositions, or otherwise find out what information they may have."²¹ Disclosing the names and locations of retained but nontestifying experts would, in most cases, serve no legitimate purpose since a party must demonstrate "exceptional circumstances" before discovering information possessed by such experts. Even if "exceptional circumstances" exist, discovery of "facts known or opinions held" may be ordered to proceed through interrogatories, a process that makes irrelevant the locations of rule 26(b)(4)(B) experts.²²

The Advisory Committee Note to rule 26(b)(4) also suggests that rule 26(b)(1)'s relevance standard applies only to occurrence witnesses and not to experts. It removes from the scope of rule 26(b)(4) any expert witness who acquired information for trial "because he was an actor or viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit. Such an expert should be treated as an ordinary witness."²³ The Committee Note, which illustrates that the drafters knew how to exempt certain experts, does not explicitly remove the identities of retained but nontestifying experts from the scope of rule 26(b)(4).

Perhaps the most persuasive argument against the majority approach can be found in the Advisory Committee's indication that the

phrase used in rule 26(b)(4)(B), but impossible for the adversary to obtain facts or opinions on the same subject by other means.

Professor Albert Sacks, reporter to the committee, listed two [examples of exceptional] circumstances at a Practising Law Institute Seminar on Discovery Sept. 25-26, 1970, in Atlanta. His description of the circumstances can be paraphrased as follows:

(a) Circumstances in which an expert employed by the party seeking discovery could not conduct important experiments and test[s] because an item of equipment, etc., needed for the test[s] has been destroyed or is otherwise no longer available. If the party from whom discovery is sought had been able to have its experts test the item before its destruction or nonavailability, then information obtained from those tests might be discoverable.

(b) Circumstances in which it might be impossible for a party to obtain its own expert. Such circumstances would occur when the number of experts in a field is small and their time is already fully retained by others.

See AMERICAN COLLEGE OF TRIAL LAWYERS & ALI-ABA JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, CIVIL TRIAL MANUAL 189 (1974), *quoted in* Ager v. Jane C. Stormont Hosp. & Training School for Nurses, 622 F.2d 496, 503 n.8 (10th Cir. 1980).

21. C. WRIGHT & A. MILLER, *supra* note 6, § 2013, at 102-03 (footnote omitted).

22. Rule 26(b)(4)(B) does not specify the proper method of discovery, in contrast to rule 26(b)(4)(A), which prescribes interrogatories or other means pursuant to court order.

23. Advisory Committee Note, 48 F.R.D. 487, 503 (1969).

identities of retained but nontestifying experts may be discovered “on a proper showing.”²⁴ Since a party may have to make some showing under both the majority and minority approaches, the phrase is somewhat ambiguous. Although “proper showing” arguably could refer to a mere showing of relevance, several factors suggest that the *Ager* court’s equation of “proper showing” with “exceptional circumstances”²⁵ more nearly captures the drafters’ intent. First, as indicated by its introductory language, rule 26(b)(4) assumes that the relevance standard has been satisfied.²⁶ Its subsections impose requirements that supplement the minimums of rule 26(b)(1). Logic suggests, therefore, that a statement by the Advisory Committee explicating those additional requirements in a note to rule 26(b)(4)(B) does not refer merely to the showing of relevance that rule 26(b)(4) assumes has already been made. The Advisory Committee’s use of the word “showing,” moreover, is instructive since the word appears only in the language of rule 26(b)(4)(B) and not in rule 26(b)(1). This, combined with the facts that rule 26(b)(1) ordinarily requires no showing by a party seeking discovery while rule 26(b)(4)(B) always requires parties to convince the court that disclosure is appropriate, suggests that the intended referent of “proper showing” is rule 26(b)(4)(B)’s “exceptional circumstances” test.

Finally, the majority approach overlooks the inferences that can be drawn from the dates of enactment of rules 26(b)(1) and 26(b)(4)(B). The pertinent language of rule 26(b)(1) has been part of the Federal Rules of Civil Procedure since their initial enactment in 1938.²⁷ Until the 1970 amendments, which included the current rule 26(b)(4), the Federal Rules did not contain any provision regarding expert discovery,²⁸ and many courts allowed no discovery of experts’ information.²⁹ From an historical perspective, therefore, rule 26(b)(1) could not have been intended to address the discoverability of rule 26(b)(4)(B) experts’ identities. There is no evidence that in drafting the 1970 amendments, the Advisory Committee intended to apply the already existing standard established by rule 26(b)(1) for

24. 48 F.R.D. at 504.

25. See note 17 *supra*.

26. FED. R. CIV. P. 26(b)(4) (“otherwise discoverable under the provisions of subdivision (b)(1) of this rule”).

27. The original rule 26(b) governed the scope of discovery by deposition and allowed a party to discover “the identity and location of persons having knowledge of relevant facts.” 1 F.R.D. xcvi (1941). The rules dealing with discovery by means other than deposition incorporated by reference rule 26(b)’s scope provision. The 1970 amendments effected a major reorganization of the discovery rules: rule 26(b) was made a general provision governing the scope of discovery by any means rather than by deposition alone.

28. See generally 4 MOORE’S FEDERAL PRACTICE, *supra* note 6, ¶ 26.66, at 26-463 to 485; C. WRIGHT & A. MILLER, *supra* note 6, §§ 2029-2035, at 240-67.

29. C. WRIGHT & A. MILLER, *supra* note 6, § 2029, at 240-49.

occurrence witnesses to the discovery of the identities of retained but nontestifying experts.³⁰

Thus, what little evidence exists in the language of rule 26(b) and in the Advisory Committee Note suggests that the majority's liberal approach to the discoverability of the identities of nontestifying experts is incorrect. Although statutory interpretation, particularly on so scant a record, is admittedly an imprecise endeavor, the evidence strongly favors the *Ager* court's more restrictive approach. That approach, with one modification suggested in Part II, also strikes an appropriate balance between the goals of ensuring adequate pretrial disclosure and preventing unfairness in adversarial competition.

II

The question whether the identities of retained but nontestifying experts should be routinely disclosed under rule 26(b)(1) or subjected to rule 26(b)(4)(B)'s more stringent requirements implicates two fundamental discovery policies. Rule 26(b)(1)'s liberal relevance standard ensures full and open pretrial disclosure — the primary goal of the discovery process.³¹ But the Federal Rules of Civil Procedure also seek to prevent unfairness in adversarial competition.³² Disclosure of information known or opinions held by experts allows the discovering parties to derive unfair benefits from their adversaries' better preparation,³³ thus rewarding laziness and deterring

30. Indeed, according to Judge Charles W. Joiner, a member of the committee that drafted rule 26(b)(4), the drafters did not intend to apply the already existing language of rule 26(b)(1) to identification of rule 26(b)(4)(B) experts. Letter from Judge Charles W. Joiner to Michigan Law Review Association (Nov. 4, 1981) (on file with the *Michigan Law Review*).

31. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (purpose of the discovery rules is to "make a trial less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (with advent of new discovery rules, no longer are civil trials "to be carried on in the dark"); 4 MOORE'S FEDERAL PRACTICE, *supra* note 6, ¶ 26.02, at 26-62 to 68; C. WRIGHT & A. MILLER, *supra* note 6, § 2001, at 13-20.

32. See *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir. 1975); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976); *Pearl Brewing Co. v. Joseph Schlitz Brewing Co.*, 415 F. Supp. 1122 (S.D. Tex. 1976); *Inspiration Consol. Copper Co. v. Lumbermens Mut. Cas. Co.*, 60 F.R.D. 205 (S.D.N.Y. 1973).

33. See Advisory Committee Note, 48 F.R.D. 487, 504 (1969). The unfairness doctrine was developed by courts as a limit on expert discovery prior to the 1970 adoption of rule 26(b)(4), when the Federal Rules contained no provision regarding discovery of experts. See, e.g., *United States v. 23.76 Acres of Land, More or Less*, 32 F.R.D. 593, 597 (D. Md. 1963). As originally conceived, the unfairness doctrine was concerned with protecting a party's "property right" in the expert's testimony. See, e.g., *Lewis v. United Air Lines Transp. Corp.*, 32 F. Supp. 21, 23 (W.D. Pa. 1940). Since rule 26(b)(4)(C) provides for payment of fees in proper cases, see note 13 *supra*, this is no longer of concern. See C. WRIGHT & A. MILLER, *supra* note 6, § 2034, at 259-60.

Prior to the 1970 adoption of rule 26(b)(4), courts also denied discovery on the grounds of attorney-client privilege. See, e.g., *American Oil Co. v. Pennsylvania Petroleum Prods. Co.*, 23 F.R.D. 680, 685-86 (D.R.I. 1959), and the work product doctrine, see, e.g., *United States v. McKay*, 372 F.2d 174, 176-77 (5th Cir. 1967). In the years before rule 26(b)(4) was adopted, however, two influential law review articles thoroughly debunked the notion that the knowl-

diligence in trial preparations. Rule 26(b)(4)(B) strikes a conservative balance between ensuring adequate disclosure and preventing unfairness because it permits discovery only under "exceptional circumstances."

According to the Advisory Committee, rule 26(b)(4) mediates between these basic policies by distinguishing between testifying and nontestifying experts.³⁴ The need for disclosure is paramount in the case of testifying experts because effective cross-examination of experts at trial requires advance knowledge of their testimony. Rule 26(b)(4)(A) thus provides for limited discovery concerning the identity and testimony of such experts. But disclosure of facts known and opinions held by nontestifying experts is rarely necessary because there will be no cross-examination and the opponent can usually obtain the information possessed by the expert from other sources. Rule 26(b)(4)(B), therefore, minimizes unfairness and encourages the retention of nontestifying experts by restricting access to their information and opinions in the absence of "exceptional circumstances."

Routine disclosure of the identities of nontestifying experts upsets the drafters' intended balance. Parties who obtain a rule 26(b)(4)(B) expert's identity can circumvent the discovery process by contacting the expert directly in an effort to induce informal disclosure. In this way, parties may gain access to information otherwise available only under "exceptional circumstances." Several undesirable consequences may follow. Informal disclosure allows parties to take unfair advantage of the time and expense that their adversaries have spent finding experts and familiarizing them with the case.³⁵ In

edge of an expert is protected by either the attorney-client or the work product privilege. See Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962); Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 39 WASH. L. REV. 665 (1964). Accordingly, the drafters of rule 26(b)(4) commented as follows:

These new provisions of subdivision (b)(4) repudiate the few decisions that have held an expert's information privileged simply because of his status as expert They also reject as ill-considered the decisions which have sought to bring expert information within the work-product doctrine The provisions adopt a form of the more recently developed doctrine of "unfairness."

48 F.R.D. at 504-05 (citations omitted).

34. 48 F.R.D. at 504. For an analysis of the rationale behind the distinction between testifying and nontestifying experts, see Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 282 (1968).

35. Professor Graham comments as follows regarding the unfairness of informal contact between a retained nontestifying expert and an opponent:

Various considerations support the belief that a party should be free to consult an expert without any fear of the expert subsequently disclosing information to an opponent. A party obviously hopes that the time, money, and effort expended to locate and prepare an expert will not result in valuable expert assistance for an opponent. Moreover, in the process of consulting the expert, a person may disclose facts and discuss litigation strategy as part of the team preparation for trial. Any disclosure of such information to an opponent would be extremely damaging [R]ules of procedure governing the discovery of expert witnesses must protect a party from an expert witness previously consulted walking into the opponent's arms.

addition, the possibility of informal disclosure may deter litigants from seeking out and retaining experts. Finally, disclosure of the identity of certain types of experts may make them reluctant to consult with litigants in the future. The *Ager* court, for example, noted the "widespread aversion" of health care professionals to assist plaintiffs in medical malpractice actions, and argued that disclosure of the expert's identity would exacerbate this reluctance.³⁶

Despite these policies favoring secrecy, identification may be necessary to enable parties to obtain further discovery to which they are entitled. Some sort of identification is necessary to alert a party to the existence of information — the expert's facts and opinions — that may be discoverable under "exceptional circumstances." Such circumstances exist when it is impracticable for the discovering party to obtain facts or opinions on the same subject by other means. "Exceptional circumstances" arise, for example, where a party's expert has run tests on an item that has since been altered or destroyed.³⁷ Without knowing what type of expert an adversary has retained and the type of services that the expert performed on the destroyed object, a party may be unable to make the required showing.³⁸

For this reason, parties have a legitimate need for disclosure of identifying information that is necessary to demonstrate the existence of "exceptional circumstances." This includes information concerning the *type of expert* that an adversary has retained and the *type of services* that the expert has performed. An interrogatory requesting information essential to the proof of "exceptional circumstances" would ask:

Graham II, *supra* note 6, at 194-95.

Professor Graham conducted an empirical study of expert discovery in federal courts and concluded that "[s]eeking . . . informal discovery of non-testifying experts whose names have been disclosed has become a significant practice in a minority of courts." *Id.* at 202.

In *Ager*, the Tenth Circuit considered the danger of informal contact to be a policy reason that favored requiring a party to show exceptional circumstances to discover a rule 26(b)(4)(B) expert's identity. 622 F.2d at 503.

36. 622 F.2d at 503.

37. *See* note 20 *supra*.

38. *Perry v. W.S. Darley & Co.*, 54 F.R.D. 278 (E.D. Wis. 1971), offers a good example of how a party needs to know some identifying information in order to show exceptional circumstances. In *Perry*, a volunteer fireman sued for injuries allegedly sustained when he was struck by a fire truck after trying to activate a pump manufactured and installed on the truck by the defendant. During the defendant's deposition of an employee of the fire department's workmen's compensation carrier, the plaintiff's counsel refused to allow the employee to disclose the identities of "certain [retained nontestifying] experts who examined the truck and pump shortly after the accident." 54 F.R.D. at 279. When the defendant moved to compel the plaintiff to identify the experts, the court refused to order the disclosure because, in its view, the fact that the experts had examined the fire truck "well before the commencement of the present action" did not prove the existence of exceptional circumstances. 54 F.R.D. at 280. But knowing the type of experts involved as well as the nature of their examination of the truck might have helped the defendant to show exceptional circumstances. If their examination altered the condition of the truck and pump, then exceptional circumstances clearly existed. *See* note 20 *supra*.

(1) Have you retained or specially employed any experts in anticipation of litigation whom you do not expect to call at trial?

(2) If yes, please describe the types of experts retained (*i.e.*, their fields of expertise) and the nature of the services that they performed in anticipation of litigation or preparation for trial.

Although interrogatories seeking this information serve a legitimate purpose, parties typically request more information. In particular, their interrogatories almost always ask their opponents to provide the names and addresses of all experts retained or specially employed.³⁹ This additional information is not necessary to enable a party to demonstrate the existence of "exceptional circumstances." Retained experts may refuse to discuss the cases that they are working on with opponents of their employers,⁴⁰ but courts should not create the danger of one party obtaining access to the information known and opinions held by an opponent's retained but nontestifying expert by requiring the retaining party to disclose the expert's name and address.

CONCLUSION

Courts that have considered the discoverability of the identities of retained but nontestifying experts have not attempted to distinguish among the various components of these experts' "identities." This Note has suggested, however, that courts making such a distinction can achieve an appropriate balance of disclosure and fairness. To prevent unfairness in adversarial competition, courts should permit discovery of retained but nontestifying experts' names and addresses only if the discovering party demonstrates "exceptional circumstances." But to ensure that a discovering party's ability to show that such circumstances exist is not impeded, courts should allow routine discovery of retained experts' areas of expertise and the nature of the services that they performed.

39. *See, e.g.*, *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179, 181 (D. Md. 1976).

40. *See Graham I, supra* note 6, at 933.